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No. 10-1491

Supreme Court, U.S.
JUL 12 2011
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In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIPKO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMBASSADOR DAVID J. SCHEFFER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, AS AMICUS CURIAE IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international criminal law, corporate social responsibility, and international human rights law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. Ambassador Scheffer led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, Special Court for Sierra Leone, and

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief; and the consent emails have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Extraordinary Chambers in the Courts of Cambodia. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

Ambassador Scheffer submits this brief out of concern that the United States Court of Appeals for the Second Circuit errs in its analysis of the Rome Statute's exclusion of corporations, or juridical persons, from the personal jurisdiction of the International Criminal Court. He believes this brief is necessary to clarify the meaning of the Rome Statute with respect to the exclusion of corporate liability from its personal jurisdiction. The majority's judgment reflects serious misunderstandings of the Rome Statute and thus the writ of certiorari should be granted to review the critical issue of corporate liability under the Alien Tort Statute.

SUMMARY OF ARGUMENT

The majority in the Second Circuit judgment seriously errs in its understanding of why the Rome Statute excludes corporations from the International Criminal Court's personal jurisdiction. The negotiators' decision in Rome to exclude corporations had nothing to do with customary international law and everything to do with a complex and diverse application of *criminal* (as opposed to civil) liability for corporate conduct in domestic legal systems around the globe. Given that diversity, it was neither possible

to negotiate a new standard of criminal liability with universal application in the time frame permitted for concluding the Rome Statute, nor plausible to foresee implementation of the complementarity principle of the treaty when confronted with such differences in criminal liability for juridical persons. Additionally, the negotiations in Rome steered clear of *civil* liability for tort actions by multinational corporations because civil liability falls outside of the jurisdiction of the International Criminal Court. Thus, no conclusion can be drawn either from the negotiations leading to the Rome Statute or from the absence of corporate criminal liability in the Rome Statute that would preclude national courts from holding corporations liable in civil damages for torts committed on national or foreign territory.

ARGUMENT

I. The Negotiations for the Rome Statute of the International Criminal Court Focused on Corporate Criminal Liability and Not Corporate Civil Liability

The Circuit Court draws from its misinterpretation of footnote 20 of *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004),[2] the requirement that

[2] "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."

corporate liability be a "specific, universal, and obligatory" legal norm in order to hold Royal Dutch Petroleum or any other corporation liable under the Alien Tort Statute. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (quoting *Sosa*, 542 U.S. at 732). In so misconstruing footnote 20, the Circuit Court requires that the character of the tortfeasor must be firmly established as a matter of international law. The Circuit Court then goes on to misinterpret the drafting history of the Rome Statute as revealing that the global community lacks a "consensus among States concerning corporate liability for violations of customary international law." *Id.* at 136-37. This reading of the negotiating history is seriously flawed. *See* David Scheffer and Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under The Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L LAW 334, 364-365, 368 (2011). The only lack of consensus at Rome concerned corporate *criminal* liability, and the difference between criminal and civil liability exists both in Alien Tort Statute precedent and in international law.

A. The negotiators at Rome could not reach a consensus on criminal liability of juridical persons because, unlike that of civil liability, practice varies around the world

There was significant discussion during the Rome Diplomatic Conference in June and July 1998

about a proposal to include juridical persons in the personal jurisdiction of the International Criminal Court. The debate centered on whether the International Criminal Court should have the authority to prosecute corporations for violations of international *criminal* law and then impose *criminal* penalties on such juridical persons.

Whereas it is universally accepted that corporations are subject to civil liability under domestic law,[3] practice varies considerably in national systems around the globe on the *criminal* liability of corporations and the penalties associated therewith. That presented a substantial problem for the negotiators because the unique complementarity structure of the Rome Statute favors similarity on the most fundamental elements of criminal liability in states parties' criminal law systems in order to lift much of the burden of prosecution from the International Criminal Court and devolve it to national courts.

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[3] *See, e.g.*, CODE CIVIL [C. CIV.] art. 1382-84 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, § 31 (Ger.); MINPŌ [MINPŌ] [CIV. C.] art. 709, 710, 715 (Japan); *see generally*, International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, BUSINESS & HUMAN RESOURCE CENTRE (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJ Paneloncomplicity; *see also Doe VIII v. Exxon Mobile Corp.*, No. 09-7125, 2011 WL 2652384, at *32 (D.C. Cir. July 8, 2011) ("Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood.").

A convicted person before the International Criminal Court must be punished with imprisonment (Rome Statute, art. 77(1)) but the Court may also order the forfeiture of proceeds, property, or assets derived directly or indirectly from the crime (*Id.*, art. 77(2)) for reparations to the victims. *Id.*, art. 75. There was no consensus among delegations in Rome about how to impose a *criminal* penalty comparable to imprisonment upon a corporate defendant and that issue alone cratered talks about how to extend the Court's criminal jurisdiction to juridical persons.

As Per Saland, Chairman of the Working Group on the General Principles of Criminal Law, explained, it was impossible to reach a consensus on criminal liability of juridical persons in the time allotted:

> One [further difficult issue of substance] which followed us to the very end of the Conference was whether to include criminal responsibility of juridical persons alongside that of individuals or natural persons. This matter deeply divided the delegations. . . . Time was running out, and the inclusion of the criminal responsibility of juridical persons would have had repercussions in the part on penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome.

Per Saland, *International Criminal Law Principles, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING

OF THE ROME STATUTE 189, 199 (Roy Lee ed., 1999). This disagreement before and during the Rome negotiations was centered upon whether corporations can be held *criminally* liable for the commission of atrocity crimes or other torts. Negotiators were not addressing *civil* liability for anyone – natural or juridical persons – in the creation of the International Criminal Court.

B. There is a meaningful difference between civil and criminal liability in the history of the Rome Statute negotiations, in Alien Tort Statute precedent, and in international law

Contrary to the Circuit Court's erroneous reading of *Sosa*, the distinction between civil and criminal liability exists both in the history of the negotiations at Rome and in the Rome Statute itself. Whereas Justice Breyer's defense of the Alien Tort Statute in his *Sosa* concurrence explains that it is acceptable to recognize civil liability where criminal liability has been established internationally, 542 U.S. at 762, the Circuit Court mistakenly denies the antecedent by asserting that it is *unacceptable* to recognize civil liability where criminal liability has *not* been established internationally, as "international law does not maintain [a] kind of hermetic seal between criminal and civil law." *Kiobel*, 621 F.3d at 146 (quoting *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 270 n.5 (2d Cir. 2007), *aff'd sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (citing

Sosa, 542 U.S. at 762-63)). But *Sosa*'s language merely recognizes that civil liability is appropriate under the Alien Tort Statute where the greater justification required for criminal punishment has already been established. The Circuit Court errs in mistaking a sufficient condition for a necessary condition. More fundamentally, *Sosa*'s identification of a greater requisite justification for criminal liability leads not to a similarity between the two types of liability, but a significant difference.

While it may be true that some countries allow certain civil penalties to arise within domestic criminal actions, *Sosa*, 542 U.S. at 762, the negotiators at Rome could not agree either on criminal liability for corporations or the punishment for "convicting" a corporation, including the formula for imposing civil penalties alongside mandatory criminal penalties. As a result, we decided to retain our narrow focus on criminal liability of individuals only – under a statute designed to create an international criminal court – and left civil damages for natural and juridical persons out of the discussion and the court's jurisdiction. To read the failure to agree on and resulting omission of *criminal* liability for juridical persons under the Rome Statute as an "*express rejection* . . . of a norm of corporate liability in the context of human rights violations," *Kiobel*, 621 F.3d at 139 (emphasis in original), is incorrect. To then posit that one can infer, under *Sosa*, that lack of criminal liability in the Rome Statute should dictate a lack of civil liability for juridical persons under the Alien Tort Statute is both

a misunderstanding of the negotiations at Rome and an illogical reading of *Sosa*.

The U.S. delegation in Rome had no authority, and received no instructions, to negotiate any outcome that would deny corporate civil liability under the Alien Tort Statute, particularly following years of federal jurisprudence embracing such corporate liability. If the Circuit Court majority's point of view had been presented to the U.S. delegation, namely that the result of our negotiations would be the denial of corporate civil liability under the Alien Tort Statute, we not only would have denied any such purpose, we would have sought explicit instructions from the Department of Justice to confirm such an objective as the official policy of the U.S. Government in the Rome negotiations.

Furthermore, if the issue simply had been one of civil remedies, and thus consistent with the Alien Tort Statute, the outcome might have been very different and the proposal for corporate civil liability might well have survived in some fashion. But holding corporations *criminally* responsible for atrocity crimes under the Rome Statute indeed was a bridge too far in 1998 for purposes of creating a new international criminal court.

Thus, no conclusion should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute other than that no timely political consensus could be reached to use this particular treaty-based international court to

prosecute corporations under international criminal law for atrocity crimes.

II. Negotiators Understood Corporate Civil Liability as a General Principle of Law That Was Irrelevant to the Criminal Jurisdiction of the International Criminal Court

The interpretation of the Rome Statute espoused by the majority, concluding that the treaty purposely meant to express a principle of law precluding national courts of law – either civil or criminal – from proceeding against corporations for the commission of atrocity crimes or other violations of international law is in error. *Kiobel*, 621 F.3d at 139. Negotiations on the Rome Statute operated on the basis of consensus, which meant that political compromises dictated the outcome of many disputes among delegations. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 16-22 (4th ed. 2011). Seeking consensus in such negotiations does not mean that the delegations were confirming a rule of customary international law on every issue set forth in every provision of the treaty. Indeed, the opposite often occurred, namely, in order to achieve consensus, the result was *not* customary international law but instead a narrow political compromise unique to the creation of an international criminal court. As such, the D.C. Circuit recently concluded that "[t]he Rome Statute . . . is properly viewed in the nature of a

treaty and not as customary international law." *Exxon*, 2011 WL 2652384, at *18.

The issue before the negotiators of the Rome Statute was whether corporations should be held criminally liable for the same atrocity crimes – genocide, crimes against humanity, and war crimes – that individuals can be prosecuted for before the International Criminal Court. The fact that negotiators ultimately rejected corporate liability under the Rome Statute had nothing to do with rules of customary international law and everything to do with whether national legal systems already held corporations criminally liable or would be likely to under the principle of complementarity of the Rome Statute.[4]

The expectation of negotiators – as confirmed in Articles 17, 18, and 19 of the Rome Statute pertaining to admissibility – was that national legal systems either 1) would ensure relative conformity in their criminal codes to the subject matter and personal jurisdiction of the International Criminal Court and

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[4] "[I]t is clear that [when treaties] establish the possibility of establishing an international court . . . such compacts [are] drafted under the assumption that the international crimes they cover will be prosecuted by national courts. . . . Accordingly, parties to such treaties are obligated to make certain international acts domestic crimes pursuant to domestic law and, at least to the extent the relevant crimes are committed by their nationals or in the territory, are bound to prosecute them." José E. Alvarez, *Alternatives to International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 25, 28 (Antonio Cassese ed., 2009).

then exercise the political will to investigate and prosecute atrocity crimes as defined in the Rome Statute against accused perpetrators falling within the jurisdiction of national courts, or 2) would face the reality that the International Criminal Court may proceed with its own investigations and prosecutions. The ideal world, one day, would be an empty docket at the International Criminal Court because national criminal courts are exercising the full responsibility to bring such individuals to justice.

This formulation of "complementarity" was expressed in the preamble of the Rome Statute: "*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, preamble. National courts would be given preference to exercise jurisdiction provided 1) their criminal codes cover the atrocity crimes found in the Rome Statute, and 2) there is a demonstrated will to investigate and prosecute such crimes by individuals falling within the domestic jurisdiction of that nation.

To have extended the complementarity concept to juridical persons would have required a much higher degree of confidence among delegations that national legal systems globally already exercised or would soon have the capacity to exercise criminal jurisdiction over corporations for the commission of atrocity crimes. While such criminal jurisdiction may exist in some national systems, it was not a global phenomenon in 1998. But our focus was never on the issue of civil liability for egregious torts

committed by corporations as we were strictly confined to criminal liability and punishment in our work.

Professor William Schabas explains,

> Proposals that the Court also exercise jurisdiction over corporate bodies in addition to individuals were seriously considered at the Rome Conference. While all national legal systems provide for individual criminal responsibility, their approaches to corporate criminal liability vary considerably. With a Court predicated on the principle of complementarity, it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law. During negotiations, attempts at encompassing some form of corporate liability made considerable progress. But time was simply too short for the delegates to reach a consensus and ultimately the concept had to be abandoned. (citations omitted)

WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (4th ed. 2011). But the majority overlooked all of these realities to assume, erroneously, that the negotiators of the Rome Statute rejected corporate criminal liability because of their failure to discover a rule of customary international law mandating it as such. The omission of juridical persons from the Rome Statute does not mean that corporations enjoy virtual immunity under international law from either civil or criminal liability; it

simply means that the International Criminal Court was established without corporations being subject to its heavily negotiated jurisdiction.

CONCLUSION

The majority in the Second Circuit judgment errs in fundamentally misinterpreting the Rome Statute of the International Criminal Court and the negotiations leading to its conclusion in the summer of 1998. The personal jurisdiction of the Rome Statute is limited to natural persons because no consensus was reached among delegations as to the *criminal* liability of juridical persons in national legal systems throughout the world. Such a finding would be critical for the necessary operation of the complementarity principle under the Rome Statute. No one, however, was disputing *civil* liability for juridical persons as a general principle of law in national legal systems globally, which is a significantly different point under a correct reading of *Sosa*. *Sosa* does not reasonably support the proposition that disagreements about international criminal procedure would negate such a well-accepted general principle of civil liability.

Since the International Criminal Court has no civil liability within its jurisdiction – even over natural persons – the issue of corporate civil liability was irrelevant. Thus the omission of corporate liability under the Rome Statute simply reflected the diverse

views of delegations about criminal liability for corporations under their national legal systems. It was not a judgment about the status of corporate civil liability as a matter of customary international law or as a general principle of law enforceable against corporations in national courts for the commission of torts, including those that would meet the *Sosa* test for subject matter jurisdiction under the Alien Tort Statute.

For these reasons, this Court should grant the Petition for Writ of Certiorari.

Dated: July 12, 2011

Respectfully submitted,

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